BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF THE CHEMITHON CORPORATION, Appellant, vs. PUGET SOUND AIR POLLUTION CONTROL AGENCY, Respondent.	PCHB No. 489 FINAL FINDINGS OF FACT, CONCLUSIONS AND ORDER

This matter, the appeal of a $250 civil penalty for an alleged smoke emission violation of respondent's Regulation 1 came before the Pollution Control Hearings Board (Walt Woodward, presiding officer, and Mary Ellen McCaffree) in the Washington Commerce Building, Seattle on March 4, 1974.

Appellant appeared through J. Richard Aramburu and, for purposes of a closing statement, also through its president, Richard A. Brooks; respondent appeared through Keith D. McGoffin. Richard Reinertser Olympia court reporter, recorded the proceedings.

Witnesses were sworn and testified. Exhibits were admitted. Mr. Brooks made a closing statement. Counsel submitted briefs in final argument.

From testimony and closing statement heard, exhibits examined, briefs and exceptions considered, the Pollution Control Hearings Board makes these

FINDINGS OF FACT

I.

On November 9, 1973, from the spray drier stack of appellant's detergent plant at 5430 West Marginal Way Southwest, Seattle, King County, there was emitted for six consecutive minutes blue-white smoke of 70 percent opacity. This was observed and recorded by a trained and experienced smoke-reading inspector on respondent's staff, said inspector having made his observation while he was positioned in the public right-of-way of West Marginal Way Southwest about 150 feet distant from the stack. The smoke plume travelled across the inspector's line of sight and was observed against the nearby green colored wall of a neighboring industrial plant.

II.

Section 9.03 of respondent's Regulation I makes it unlawful to cause or allow the emission for more than three minutes in any one hour of an air contaminant greater than 40 percent opacity. Section 1.07(b) of Regulation I defines "an air contaminant" to mean, among other items, "dust . . . smoke . . . other particulate matter . . or any combination thereof." Section 3.29 of Regulation I authorizes a civil penalty of not more than $250 for any violation of the Regulation Section 1.01 of Regulation I speaks to the necessity of controlling

the emission of air contaminants in order to protect "human health and safety."

III.

In connection with the incident described in Finding of Fact I, respondent served on appellant Notice of Violation No. 8789, citing Section 9.03 of Regulation I, and Notice of Civil Penalty No. 1249 in the sum of $250, which penalty is the subject of this appeal.

IV.

When appellant's plant is in "normal" operation there theoretically should be no emission from the spray drier stack other than uncombined water vapor, but this has not been proven by stack sample testing. Malfunction of the mechanical equipment and/or certain formulations of detergent slurry could cause detergent dust particulants and/or unburned hydrocarbons to be emitted.

V.

Any Conclusion of Law hereinafter stated which is deemed to be a Finding of Fact herewith is adopted as same.

From these Findings, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

Appellant contends that Notice of Violation No. 8789 falls and fails because it is based on an emission observed by respondent's inspector in violation of the unreasonable search prohibition of the Fourth Amendment of the United States Constitution and in violation of the due process provisions of the same document's Fifth Amendment.

We disagree with and reject both contentions. The inspector stood in a public right-of-way and did not trespass on appellant's property in taking the observation; there, therefore, was no "unreasonable search." There, similarly, was no more "due process" violation than there would be in the routine issuance of a speeding citation to a motorist by a traffic patrolman; it would be no less ridiculous to require an air pollution inspector, charged with patrolling a large industrial area, to knock on every alleged violator's door and "warn" that an emission observation was about to begin than it would be to require a busy state patrolman to "warn" a speeding motorist that the speed of the motorist's vehicle was about to be clocked. The inspector, in this matter, conducted his emission observation within the "plain view rule" decisions of both the State Supreme Court and the United States Supreme Court.

While the above is this Board's conclusion as to Constitutional contentions raised by appellant, it does not address the peculiar problem created by the unusual experimental work conducted by appellant as a world-wide leader in the detergent-manufacturing process. This problem is an underlying factor in this matter and in similar cases involving these litigants which have come before this Board. There are solutions, however, to this underlying peculiar problem; these solutions are known to both litigants. The instant matter is not the proper vehicle for an application of these solutions.

II.

As to appellant's contention that Notice of Civil Penalty No. 1249 is invalid because it is not based on a violation of the

substantive standards of Regulation I, the Board does not agree; respondent's Board of Directors adopted the several provisions of Regulation I in response to the legislative mandate of RCW 70.94, the Washington Clean Air Act, and made it clear, in Section 1.01 of Regulation I, that any violation of Regulation I is a threat to human health and safety.

III. (NEW)

Respondent, in a civil penalty case, has the burden of proving a prima facie case. A prima facie case was proven by respondent through the testimony of its inspector, who testified as to the nature of the visual emissions. At that point, the burden of going forward with the evidence shifted to the appellant. Appellant then proved that when the plant was operating in a normal fashion, the emissions alleged to have occurred could not scientifically happen. However, appellant did not prove that the plant was operating normally at the time of the alleged violation. There is no evidence as to whether the facility was operating normally at the time of the alleged violation. Query: Who has the burden of going forward with the evidence? We find that the appellant has that burden since this knowledge is peculiarly within its control.

IV.

Appellant was in violation of Section 9.03 of respondent's Regulation I as cited in Notice of Violation No. 8789. The sum invoked in Notice of Civil Penalty No. 1249 is reasonable in view of all the circumstances.

V.

Any Finding of Fact herein which is deemed to be a Conclusion of Law herewith is adopted as same.

Therefore, the Pollution Control Hearings Board issues this

ORDER

The appeal is denied and Notice of Civil Penalty No. 1249 is sustained in the full amount of $250.

DONE at Lacey, Washington this 18th day of October, 1974.

POLLUTION CONTROL HEARINGS BOARD

Walt Woodward
WALT WOODWARD, Chairman

W. A. Gissberg
W. A. GISSBERG, Member